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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LYNN LEROY LOCKHART, Defendant and Appellant.	G040889 (Super. Ct. No. FWV035340) O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, Ingrid Adamson Uhler, Judge. Affirmed.

Patricia Ihara, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., Stephanie H. Chow, and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Lynn Leroy Lockhart appeals from a judgment after a jury convicted him of a plethora of offenses arising out of a series of robberies in the summer of 2005. Lockhart argues insufficient evidence supports his conviction on three of the counts, and there was prejudicial error when the trial court informed the jury it would have to wait one week to hear a readback of testimony because the court reporter was on vacation. Although we agree the trial judge should have arranged for a substitute court reporter to provide any requested readback of testimony, we conclude Lockhart was not prejudiced. None of his other contentions have merit, and we affirm the judgment.

FACTS

July 14, 2005-Counts 1-3

Erin Juneau was assisting a customer at Shurguard Storage when Lockhart and a "younger" man walked in. Lockhart was wearing jean shorts, a white shirt, and a straw hat, and his eyes were yellow. Lockhart asked if he could use the restroom, and Juneau directed him to the facilities. When the customer left, the younger man inquired about renting a storage unit and began filling out the paperwork. Lockhart exited the bathroom and began walking in and out of the store. A third man, who was "older" entered the store with "a green flannel shirt covering a gun." Juneau could not see the gun, but "[she] could see the silhouette of the gun." The armed man told Juneau to "[g]ive [him] all [her] money." Juneau froze, and all three men went behind the counter. They told her not to look up or they would shoot her, and one of the men grabbed her keys and locked the front door. They asked where the cash register and surveillance cameras were, and Lockhart tore out the telephone cords. Lockhart used either a trashcan bag or a glove to take money from the safe and the cash drawer. He told Juneau to pull out the surveillance camera cords and remove the camera system, which she did. The men went through Juneau's purse and took her driver's license and money. The younger man showed Juneau her driver's license and said, "'We're going to keep this. If you tell the cops that it was three white guys who robbed you, you'll get this ID back. No harm,

no foul. If you do tell them the truth, that it was three black guys that robbed you, we do have tracers and we can listen to phone calls. We'll come to your house. We'll kill you. We've followed both you and your manager home. We know exactly where you live, and we'll come and kill you." The younger man also told Juneau, "Don't take any offense" and "It's nothing against you[,]" but "[they] have bills to pay[.]" He told her to stay in the bathroom for 30 minutes or the other two men would kill her. Juneau positively identified Lockhart from a photographic lineup the following month.

July 17, 2005-Counts 4-7

Three days later, Cassandra Anderson arrived for work at The Club, but the doors were locked. A small gray/blue sports utility vehicle with front end damage stopped in the parking lot. Three men got out of the vehicle and tried to enter the bar, but they could not. One of the men asked Anderson what time the bar opened. Lockhart was wearing a light-colored shirt and a light-colored "doo-rag," and his eyes were yellow. Martin Vasquez, the bar manager, arrived and opened the bar, and he and Anderson went inside. A short time later, Lockhart, Terryance Smith, and the third man entered and sat down at a table. As Vasquez made a telephone call and Anderson tried to clock-in, the three men approached the bar. Smith jumped the bar, and the third man pointed a gun at Vasquez and Anderson. Smith took Vasquez's Nextel Motorola cellular telephone. One of the men told them to get on the ground and to open the register. After Vasquez told them the money was in the bag on the bar, one of the men said they wanted to go to the safe. While Smith stayed with Anderson, Lockhart and the man with the gun directed Vasquez to the safe, and Vasquez emptied the safe. They all walked back to the bar. After the men asked Vasquez and Anderson whether they needed any money, the men told them to lay down, face the wall, and not to move for 35 minutes. The men told them the robbery "was all a dream[,]" to tell the police "[i]t was two white guys who did this[,]" they had police scanners and if they heard anything, they would come back for them, and they had laser sights on their heads and they could shoot them from a distance.

July 21, 2005-Counts 8-18

Four days later, Tiffany Ferguson and Brandon Davis were working at the Ontario Nextel store. Mark Pearce, David Shaw, and Lacy Fogelberg were in the conference room, and Ed Stansbury and Daniel Prado were in the back office. As Ferguson and Davis were preparing to close the store, three men walked in, and Ferguson asked if they needed help. The men said they were just looking. Smith pulled out a gun and pointed it at Ferguson and Davis. Smith reached into the cash register and took money from the drawer. Pearce, Shaw, and Fogelberg came out from the conference room, and the men asked where were the safe and video cameras. Smith told Fogelberg to give him all the SIM[1] cards and cellular telephones. The men directed Pearce, Shaw, and Fogelberg to the back office. Stansbury, who was in the back office, saw a man walk through the door and point a gun at him. Prado, who was also in the office, saw Lockhart pull out a gun. The men told all the employees to get on the ground, and they went through their pockets and purses and took cash, cellular telephones, a personal computer bag containing a checkbook and personal correspondence, and a personal computer bag and personal computer. They also took a PowerPoint projector. Lockhart took Prado's identification card and told him he knew where he lived and if he saw Prado's name in the report, he knew where to find him. The other men made similar statements to the other employees.

July 23, 2005-Counts 19-24

Two days later, Jesus Borjorquez, Kendra Wright, and Heather Pulanco were working at the Upland Nextel store. Two men were in the store when a third man walked in. A little later, the third man pulled out a gun and said, "'Give me the money.'" The employees complied with the men's order to get on the ground. The men told Pulanco to open the cash register, and Smith told Wright to put the cellular telephones

[1] A SIM card is a subscriber identity module that stores a subscriber's information, account number, and contacts.

and wireless accessories in a trash bag. The men took their cellular telephones and ordered them to the women's restroom where they were to remain for 10 to 30 minutes. The men asked them if they needed any money and told them to tell the police it was three white men that robbed them.

July 27, 2005-Count 25

Four days later, Tiffany Cleveland was working at S.B. Books, an adult bookstore, in Redlands. Lockhart and another man entered the store. Cleveland went into the backroom, and when she returned, another man had entered the store and he was holding a gun. Lockhart was going through the cash register. One of the men took $100 from Cleveland's purse, but returned it when she pleaded with them that it was all the money she had. The men took money from the cash register, Cleveland's cellular telephone, the store's surveillance camera, and 27 pieces of lingerie.

July 29, 2005-Counts 26-31[2]

Two days later, at the Colton Nextel store, Roberto Oliva was working, while the store owner, Arthur Barsegyan, was in the back room. Lockhart and Smith, who was wearing a dark colored "doo-rag" entered the store. A third man walked into the store and pulled out a silver gun. The armed man told Oliva to go into the back room, and once there, he told both men to get on the ground. One of the men took Barsegyan's wallet and cellular telephone. The men ordered Oliva to get up and lock the front door. Lockhart and Smith put all the cellular telephones into bags and told Oliva to put the money from the cash register into the bags. Lockhart and Smith took Oliva back to the back room and secured his and Barsegyan's hands with duct tape. The men tore out all the wires to the telephones and surveillance system. The men took Oliva's cellular

[2] There were nine additional counts, but these applied to Lockhart's co-defendant, Smith.

telephone and Blackberry. The men took Barsegyan's and Oliva's identifications and told them not to call the police or they would go after them.

Investigation

The following month, officers who had been briefed on the robberies arrested Lockhart and Smith while investigating an unrelated crime. On Lockhart's person, officers found a cellular telephone that later was determined to be one of the cellular telephones taken from the Upland Nextel store robbery. In the sports utility vehicle they were driving, officers found items taken during the various robberies and a white "doo-rag." The same day, officers searched Lockhart's and Smith's apartment and found cellular telephones, SIM cards, wireless accessories, a personal computer case, a personal computer case containing Shaw's personal computer, a projector, and security equipment.

A first amended information charged Lockhart with the following: Shurguard Storage/Juneau-second degree robbery (Pen. Code, § 211)[3] (count 1), false imprisonment by violence (§ 236) (count 2), and dissuading a witness by force or threat (§ 136.1, subd. (c)(1)) (count 3); The Sports Club Bar/Vasquez/Anderson-second degree robbery (§ 211) (count 4), false imprisonment by violence (§ 236) (count 5), second degree robbery (§ 211) (count 6), and false imprisonment by violence (§ 236) (count 7); Ontario Nextel/Pearce/Shaw/Stansbury/Prado/Ferguson/Fogleberg-second degree robbery (§ 211) (count 8), false imprisonment by violence (§ 236) (count 9), second degree robbery (§ 211) (count 10), false imprisonment by violence (§ 236) (count 11), second degree robbery (§ 211) (count 12), false imprisonment by violence (§ 236) (count 13), second degree robbery (§ 211) (count 14); false imprisonment by violence (§ 236) (count 15), dissuading a witness by force or threat (§ 136.1, subd. (c)(1))

[3] All further statutory references are to the Penal Code.

(count 16), false imprisonment by violence (§ 236) (count 17), false imprisonment by violence (§ 236) (count 18); Upland Nextel/Wright/Pulanco/Bojorquez-second degree robbery (§ 211) (count 19), false imprisonment by violence (§ 236) (count 20), second degree robbery (§ 211) (count 21), false imprisonment by violence (§ 236) (count 22), second degree robbery (§ 211) (count 23), and false imprisonment by violence (§ 236) (count 24); S.B. Books/Cleveland-second degree robbery (§ 211) (count 25); Colton Wireless/Barsegyan/Oliva-second degree robbery (§ 211) (count 26), false imprisonment by violence (§ 236) (count 27), dissuading a witness by force or threat (§ 136.1, subd. (c)(1)) (count 28), second degree robbery (§ 211) (count 29), false imprisonment by violence (§ 236) (count 30), and dissuading a witness by force or threat (§ 136.1, subd. (c)(1)) (count 31). As to all the counts, the first amended information alleged a principal in the offense was armed with a firearm within the meaning of section 12022, subdivision (a)(1).

Lockhart and Smith were tried together with separate juries. Jury trial began on September 27, 2006. At trial, the prosecutor offered evidence of several telephone calls Lockhart made while he was in custody. In one of the telephone calls Lockhart told his mother, "I did it because just because, man, I was just dumb. Damn." Lockhart's defense was mistaken identity.

On Wednesday, October 25, 2006, before the jury began deliberating, the trial court informed the jury: "Tell you something. And you can either follow my advice or disregard my advice, but I'm going to tell you that . . . the court reporter . . . is not going to be here next week. She going [*sic*] to be on a romantic vacation with her husband. So she already has that planned through October 30[] through – she will be back on November 6[]. I said the same to the jury that's deliberating on . . . Smith's jury. What I did suggest to them is if you want readback, ask for it now. [¶] And so what we have done is [the court reporter] . . . is not doing this, in terms of closing argument and instruction. She's been reading back testimony to the other jurors. So that is an option

for you. Once you start deliberation, and if you feel that you have a need for readback of testimony, you are going to have [the court reporter] all day tomorrow to yourself. [¶] So if you need that readback, you just need to make that request on a written document. And she will be provided to you for that readback. [¶] Also another option as well at the end of the day and you are still deliberating and you feel you need readback, let the judge know because I won't be here. What [the court reporter] will do between now and Monday is actually transcribe the testimony that you need. And I can provide you with a reader. Okay. Don't think that [the court reporter] can provide a transcript for three or four or five weeks of trial. Okay. She would not be able to do that. But if at the end of the day, you still feel that there is readback of some testimony that you need, then she can go ahead and have it transcribed between now and Monday. And we will provide a reader for that testimony. [¶] Obviously, you can wait. We can always wait until [the court reporter] returns if you need more readback. That is just to give you a heads-up in terms of readback of testimony. [¶] If you decide what you want tomorrow, you will have [the court reporter] to provide that for you tomorrow. But after tomorrow, that's it. She won't be here. Okay. So those are your options." The jury began deliberating that afternoon. The jury continued deliberating the following day, Thursday, and the jury was provided with readback of Anderson's and Prado's testimony. The jury did not deliberate on Friday.

On Monday, October 30, 2006, the jury resumed deliberations and requested a readback of Juneau's testimony. The trial court responded, "[T]he court reporter[] is on vacation this week, remember? So if you need readback in regards to those counts pertaining to . . . Juneau[] then you will have to wait until she returns, which certainly is okay. I would then suggest you continue to deliberate on those counts not pertaining to her testimony." Lockhart's defense counsel agreed to the court's response. The jury reached verdicts on all counts later that morning.

The jury convicted Lockhart of all counts and found true all the firearm allegations. The trial court sentenced Lockhart to 22 years in state prison.

DISCUSSION

I. Sufficient Evidence-Counts 3, 28, and 31

Lockhart argues insufficient evidence supports his convictions for three counts of dissuading a witness by force or threat. We disagree.

Section 136.1 states, in relevant part: "(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense . . . : [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge. . . . [¶] (c) Every person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously . . . , is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years . . . : [¶] (1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person."

"In reviewing a claim of insufficiency of the evidence, we review the record to determine whether it contains substantial evidence from which a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt. [Citation.] The test is whether the trier of fact's conclusions are supported by substantial evidence, i.e., evidence that is reasonable in nature, credible, and of solid value. [Citation.] We consider the evidence in a light most favorable to the judgment and draw reasonable inferences in support of the judgment. [Citation.]" (*People v. McElroy* (2005) 126 Cal.App.4th 874, 881.)

The first amended information charged Lockhart with four counts of dissuading a witness by force or threat (§ 136.1, subd. (c)(1)): count 3-Juneau;

count 16-Prado; count 28-Barsegyan; and count 31-Oliva. Lockhart acknowledges there was sufficient evidence supporting his conviction on count 16 because Prado testified Lockhart took his identification card and told him he knew where to find him. But Lockhart claims insufficient evidence supports the other counts because "there was no evidence that [he] personally threatened three of the victims with force or implied force and no evidence to support aiding and abetting liability for those crimes." Based on the entire record, we conclude there was sufficient evidence supporting Lockhart's convictions on counts 3, 28, and 31 under an aiding and abetting theory.

"A person who aids and abets the commission of a criminal offense is considered a principal in the crime. [Citation.] In order for criminal liability to be imposed under an aiding and abetting theory, the person must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citations.]' [Citation.] [¶] . . . [¶] [A]dvance knowledge is *not* a prerequisite for liability as an aider and abettor. 'Aiding and abetting may be committed "on the spur of the moment," that is, as instantaneously as the criminal act itself. [Citation.]' [Citation.]" (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 740-742.)[4]

A. Shurguard Robbery-Count 3

With respect to count 3, there was sufficient evidence from which the jury could reasonably conclude Lockhart aided and abetted his younger cohort in dissuading Juneau from reporting a crime by force or threat. The evidence demonstrates Lockhart tore out the telephone cords, used either a trash bag or a glove to take money from the safe and the cash drawer, and told Juneau to pull out the surveillance camera cords and remove the camera system. The younger man showed Juneau her driver's license and

[4] The trial court instructed the jury with CALJIC No. 3.01, "Aiding and Abetting."

said, "'We're going to keep this. If you tell the cops that it was three white guys who robbed you, you'll get this ID back. No harm, no foul. If you do tell them the truth, that it was three black guys that robbed you, we do have tracers and we can listen to telephone calls. *We'll* come to your house. *We'll* kill you. *We've* followed both you and your manager home. *We* know exactly where you live, and *we'll* come and kill you.'" (Italics added.) The man spoke on behalf of the group, of which Lockhart was undisputedly a part of.

Although the men did not attempt to dissuade the victims from reporting the crimes during all six robberies, they did attempt to do so during four of the six robberies, including the Shurguard Storage robbery. After Lockhart disabled the telephones, and ordered Juneau to disable the surveillance system, the younger man threatened Juneau after the men argued about where to put her and before the younger man walked her to the bathroom. Juneau testified the younger man threatened her in the presence of Lockhart and the older man. Juneau stated the younger man "[told] [her] that, and then he wrapped his arm around [her] shoulder and walked [her] out, as the other guys told him to." Based on Lockhart's participation in the robbery and efforts to avoid being detected, and the younger man's threat to Juneau that all the men knew where she lived and would kill her if she truthfully reported the crime, the jury could reasonably conclude Lockhart acted with knowledge of the younger man's criminal purpose and he intended to encourage commission of the crime of dissuading a witness by force or threat. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409 (*Campbell*) [concerted action implies common purpose].)

Lockhart claims it appears the men had not planned what they were going to do to prevent Juneau from calling the police because they fought about it in front of her; the younger man's comments they had tracers appears to be improvised; and it is speculative whether he knew the younger man was going to dissuade Juneau from reporting the crime. These claims are not dispositive.

The fact the men argued about where to imprison Juneau does not negate the fact they attempted to dissuade her from truthfully reporting the crime through the threat of violence. And that the younger man may have "improvised" when threatening Juneau is irrelevant because the required intent can be formed instantaneously. The fact the men took victims' identification cards in three of the four robberies, and not the other, does not mean the threats were not planned beforehand. In two of the robberies, the men told the victims to tell the police it was white men who committed the crimes, and in three of the robberies, the men said they knew where the victims lived and they would harm them if they reported the crime. There is no requirement the threat be carried out with the precision of a Shakespearean play. Finally, as we explain above, Lockhart was present when the younger man threatened Juneau, and the intent to commit the act may be formed in an instant. Based on the entire record, there was sufficient evidence for the jury to conclude Lockhart aided and abetted the crime of dissuading Juneau from reporting a crime by force or threat.

B. Colton Nextel Store-Counts 28 and 31

As to counts 28 and 31, again there was sufficient evidence from which the jury could reasonably conclude Lockhart aided and abetted his younger confederate in dissuading Barsegyan and Oliva from reporting a crime by force or threat. The evidence establishes Lockhart took cellular telephones and cash, and helped secure Oliva and Barsegyan with duct tape. Thus, there is no merit to Lockhart's contention he was unaware of the purpose of his presence. Although neither Barsegyan nor Oliva could identify who threatened them because they were both face down on the ground, they both testified the men took Barsegyan's and Oliva's identifications and told them not to call the police or they would go after them. Oliva testified "*they* grabbed . . . [his] ID . . . and then told [him] if [*they*] were to call the cops . . . , that *they* would come after [them]." (Italics added.) Barsegyan testified "[*t*]*hey* said . . . not to call the police because . . . *they'll* come back after us." (Italics added.) And as with the Shurguard Storage robbery,

Lockhart helped disable the telephones and surveillance system and his confederate threatened to harm both Barsegyan and Oliva if either of them reported the crime. Based on the concerted actions of the men during the Colton Nextel store robbery, and their similar conduct during the other robberies, there was sufficient evidence for the jury to conclude Lockhart aided and abetted the crime of dissuading Juneau from reporting a crime by force or threat. (*Campbell, supra*, 25 Cal.App.4th at p. 409.)

II. Testimony Readback-Count 3 and section 12022, subdivision (a)(1), enhancements

Relying on section 1138, and the due process clause, Lockhart contends there was prejudicial error on count 3, and the section 12022, subdivision (a)(1), allegations as to counts 1, 2, and 3, when the jury requested a readback of Juneau's testimony and the trial court informed the jury it would have to wait one week for readback of the testimony because the court reporter was on vacation. Alternatively, he correctly anticipates the Attorney General would argue he waived appellate review of this issue, and Lockhart asserts he received ineffective assistance of counsel because his defense counsel failed to object to the proposed delay. As we explain below, Lockhart was not prejudiced by the trial court's failure to provide readback of Juneau's testimony.

A. Waiver

As Lockhart anticipates, the Attorney General argues he forfeited[5] appellate review of this issue because defense counsel acquiesced in the trial court's response to the jury it would have to wait one week for the readback of Juneau's testimony. Lockhart contends he did not waive review of this issue because it is the jury's right to meaningful consideration of all the evidence and defense counsel's failure cannot result in the waiver of the jury's right.

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[5] "In this context, the terms 'waiver' and 'forfeiture' have long been used interchangeably. The United States Supreme Court recently observed, however: 'Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." [Citations.]' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.)

In *People v. Butler* (1975) 47 Cal.App.3d 273, 283-284 (*Butler*), the court addressing the same claim stated: "Although the mandate of . . . section 1138 is an important protection for a party, it is the right of the *jury* which is the primary concern of the statute; its provisions do not delegate to the trial judge, the parties, or their attorneys the right to determine the jury's wishes. Hence the relative inaction of defense counsel in the case at bench cannot attenuate the jurors' fundamental right to be apprised of the evidence upon which they are sworn conscientiously to act. Least of all can the command of the statute be ignored at the whim of the trial judge or for the convenience of the judge and counsel, particularly when, as here, the outright refusal of the jury's request committed the jury to the questionable task of reaching its decisions on the basis of incomplete evidence imperfectly heard." (*People v. Litteral* (1978) 79 Cal.App.3d 790, 796-797 (*Litteral*) ["It would be unreasonable to place upon the defendant the burden of becoming an advocate for the jury's right to rehear evidence which could conceivably unlock a previously deadlocked jury"]; but see *People v. Hillhouse* (2002) 27 Cal.4th 469, 505 [*Litteral* and *Butler* of doubtful validity because questionable whether defendant may assert jury right].)

In *People v. Frye* (1998) 18 Cal.4th 894, 1007 (*Frye*), the California Supreme Court was confronted with the same issue. The court explained that although section 1138's primary concern is the jury's right to be apprised of all the evidence, section 1138 also ensures a defendant receives a fair trial. (*Frye, supra,* 18 Cal.4th at p. 1007.) Acknowledging it had previously found a waiver of defendants' claims of violations of section 1138, the court opined, "We need not resolve defendant's claim on the basis of counsel's acquiescence, however. A conviction will not be reversed for a violation of section 1138 unless prejudice is shown. [Citations.] Assuming a violation of section 1138 has occurred, we conclude the error did not prejudice defendant under either the federal or state standard of review." (*Frye, supra,* 18 Cal.4th at pp. 1007-1008.) As we explain below, we too assume a violation of section 1138 occurred, and conclude

Lockhart was not prejudiced by the proposed delay in the readback of Juneau's testimony. But first we will discuss the trial court's failure to arrange for a substitute court reporter.

B. Section 1138

1. Section 1138

Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

Here, the trial court did not inform the jury that requests for readbacks of testimony would not be honored. The court informed the jury the court reporter would be on vacation the following week, and it would have to wait for the court reporter to return for readbacks of testimony and that was "certainly . . . okay." Although the court did not deny the jury's request for readback of Juneau's testimony, neither did it arrange for another court reporter to be available to provide readback of testimony if necessary knowing in advance the court reporter would be absent for one week. This was a long trial, with many witnesses, and the court clearly anticipated readbacks of testimony would be necessary. In the future, we encourage the trial judge to arrange for a substitute court reporter to be available for readbacks of testimony in the event the judge's court reporter is to be absent. Assuming there was a violation of section 1138 and the threat a one-week delay coerced the jury into convicting Lockhart on count 1 and finding true the section 12022, subdivision (a)(1), as to counts 1, 2, and 3, based on the evidence in the case, we conclude Lockhart was not prejudiced by the failure to readback Juneau's testimony.

2. Prejudice

As we explain above, there was sufficient evidence for the jury to conclude Lockhart aided and abetted the crime of dissuading Juneau from reporting a crime by force or threat and convict him of count 3. We also conclude there was sufficient evidence for the jury to find true the section 12022, subdivision (a)(1), allegations as to counts 1, 2, and 3.

Section 12022, subdivision (a)(1), provides: "Except as provided in subdivisions (c) and (d), any person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless the arming is an element of that offense. This additional term shall apply to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm."

Juneau testified the older man entered the store with "a green flannel shirt covering a gun." Juneau admitted she did not see the gun, but "[she] could see the silhouette of the gun." She knew it was a handgun, approximately 10 inches in length, and she believed it to be real. And the men used a gun in all the other robberies. Juneau's testimony was sufficient evidence for the jury to conclude the older man was armed with a firearm and find true the section 12022, subdivision (a)(1), allegations as to counts 1, 2, and 3 with respect to Lockhart.

Therefore, we conclude any error in informing the jury it would have to wait for the readback of Juneau's testimony was harmless beyond a reasonable doubt because there was sufficient evidence for the jury to convict Lockhart of count 1 and find true the section 12022, subdivision (a)(1), allegations as to counts 1, 2, and 3. Because we have addressed the merits of Lockhart's claims, we need not address his contention he received ineffective assistance of counsel when his defense counsel failed to object to the delay.

DISPOSITION

The judgment is affirmed.

O’LEARY, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.